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8 **BEFORE THE**  
9 **BOARD OF REGISTERED NURSING**  
10 **DEPARTMENT OF CONSUMER AFFAIRS**  
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 2010-558

13 **JOHN RALPH KELLY**  
14 **5315 North Thorne Avenue**  
15 **Fresno, CA 93711**

**A C C U S A T I O N**

16 Registered Nurse License No. 425362  
17 Public Health Nurse Certificate Number 45861  
18 Nurse Practitioner Certificate Number 14633,

Respondent.

19 Complainant alleges:

**PARTIES**

20 1. Louise R. Bailey, M.Ed., RN (Complainant) brings this Accusation solely in  
21 her official capacity as the Interim Executive Officer of the Board of Registered Nursing  
22 ("Board"), Department of Consumer Affairs.

23 2. On or about April 30, 1988, the Board of Registered Nursing issued Registered  
24 Nurse ("RN") License Number 425362 to John Ralph Kelly ("Respondent"). On or about July  
25 18, 2003, Respondent's RN license was placed on probation for a period of five (5) years, as set  
26 forth in paragraph 5 below. Respondent's RN license will expire on May 31, 2010, unless  
27 renewed.

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## JURISDICTION

3. On or about February 5, 1990, the Board issued Public Health Nurse ("PHN") Certificate Number 45861 to Respondent. On or about July 18, 2003, Respondent's PHN Certificate was placed on probation for a period of five (5) years, as set forth in paragraph 5 below. Respondent's PHN Certificate will expire on May 31, 2010, unless renewed.

4. On or about November 3, 2003, the Board issued Nurse Practitioner ("NP") Certificate Number 14633 to Respondent. Respondent's NP certificate will expire on May 31, 2010, unless renewed.

## DISCIPLINARY HISTORY

5. On June 18, 2003, pursuant to the Proposed Decision of the Administrative Law Judge adopted by the Board as its Decision in the disciplinary action titled *In the Matter of the Accusation and Statement of Issues Against John Ralph Kelly*, Case No. 2002-95, the Board ordered that Respondent's RN license and PHN certificate be revoked and that Respondent's application for an NP certificate be denied effective July 18, 2003. Respondent filed a petition for writ of mandate in Fresno County Superior Court ("trial court"). On September 26, 2003, in *John Ralph Kelly v. Board of Registered Nursing* (Super. Ct. Fresno County, 2003, Case No. 03CECG02456), the trial court set aside the Decision of the Board, reinstated Respondent's RN license and PHN certificate, granted Respondent's application for an NP certificate, and placed Respondent on probation for a period of five (5) years subject to certain conditions.<sup>1</sup> The Board appealed the judgment. On March 16, 2005, the Court of Appeal upheld the trial court's decision restoring Respondent's RN license and PHN certificate and placing Respondent on probation. The Court of Appeal also reversed the trial court's decision to issue an NP certificate to Respondent, but remanded the matter back to the trial court to enter judgment commanding the Board to reconsider Respondent's application for the NP certificate. The Board subsequently granted Respondent's application and issued NP Certificate Number 14633 to Respondent on November 3, 2003.

<sup>1</sup> On or about December 12, 2003, the trial court filed a clarification of the judgment, stating that the period of probation would be five (5) years commencing on July 18, 2003.

## STATUTORY AND REGULATORY PROVISIONS

6. Business and Professions Code ("Code") section 2750 provides, in pertinent part, that the Board may discipline any licensee for any reason provided in Article 3 (commencing with section 2750) of the Nursing Practice Act.

7. Code section 2761 states, in pertinent part:

The board may take disciplinary action against a certified or licensed nurse or deny an application for a certificate or license for any of the following:

(a) Unprofessional conduct, which includes, but is not limited to, the following:

(1) Incompetence or gross negligence in carrying out usual certified or licensed nursing functions.

\* \* \* \*

(d) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violating of, or conspiring to violate any provision or term of this chapter or regulations adopted pursuant to it. . . .

8. Code section 2762 states, in pertinent part:

In addition to other acts constituting unprofessional conduct within the meaning of this chapter [the Nursing Practice Act], it is unprofessional conduct for a person licensed under this chapter to do any of the following:

(a) Obtain or possess in violation of law, or prescribe, or, except as directed by a licensed physician and surgeon, dentist, or podiatrist administer to himself or herself, or furnish or administer to another, any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code or any dangerous drug or dangerous device as defined in Section 4022. . . .

9. Code section 4022 states:

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in humans or animals, and includes the following:

(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a . . . .," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006.

10. Code section 2836.1 states:

Neither this chapter nor any other provision of law shall be construed to prohibit a nurse practitioner from furnishing or ordering drugs or devices when all of the following apply:

(a) The drugs or devices are furnished or ordered by a nurse practitioner in accordance with standardized procedures or protocols developed by the nurse practitioner and the supervising physician and surgeon when the drugs or devices furnished or ordered are consistent with the practitioner's educational preparation or for which clinical competency has been established and maintained.

(b) The nurse practitioner is functioning pursuant to standardized procedure, as defined by Section 2725, or protocol. The standardized procedure or protocol shall be developed and approved by the supervising physician and surgeon, the nurse practitioner, and the facility administrator or the designee.

(c)(1) The standardized procedure or protocol covering the furnishing of drugs or devices shall specify which nurse practitioners may furnish or order drugs or devices, which drugs or devices may be furnished or ordered, under what circumstances, the extent of physician and surgeon supervision, the method of periodic review of the nurse practitioner's competence, including peer review, and review of the provisions of the standardized procedure.

(2) In addition to the requirements in paragraph (1), for Schedule II controlled substance protocols, the provision for furnishing Schedule II controlled substances shall address the diagnosis of the illness, injury, or condition for which the Schedule II controlled substance is to be furnished.

(d) The furnishing or ordering of drugs or devices by a nurse practitioner occurs under physician and surgeon supervision. Physician and surgeon supervision shall not be construed to require the physical presence of the physician, but does include (1) collaboration on the development of the standardized procedure, (2) approval of the standardized procedure, and (3) availability by telephonic contact at the time of patient examination by the nurse practitioner.

(e) For purposes of this section, no physician and surgeon shall supervise more than four nurse practitioners at one time.

(f)(1) Drugs or devices furnished or ordered by a nurse practitioner may include Schedule II through Schedule V controlled substances under the California Uniform Controlled Substances Act (Division 10 (commencing with Section 11000) of the Health and Safety Code) and shall be further limited to those drugs agreed upon by the nurse practitioner and physician and surgeon and specified in the standardized procedure.

1  
2 (2) When Schedule II or III controlled substances, as defined in Sections  
3 11055 and 11056, respectively, of the Health and Safety Code, are furnished or  
4 ordered by a nurse practitioner, the controlled substances shall be furnished or  
5 ordered in accordance with a patient-specific protocol approved by the treating or  
6 supervising physician. A copy of the section of the nurse practitioner's standardized  
7 procedure relating to controlled substances shall be provided, upon request, to any  
8 licensed pharmacist who dispenses drugs or devices, when there is uncertainty about  
9 the nurse practitioner furnishing the order.

10 (g)(1) The board has certified in accordance with Section 2836.3 that the nurse  
11 practitioner has satisfactorily completed (1) at least six month's physician and surgeon-  
12 supervised experience in the furnishing or ordering of drugs or devices and (2) a course in  
13 pharmacology covering the drugs or devices to be furnished or ordered under this section.

14 (2) Nurse practitioners who are certified by the board and hold an active furnishing  
15 number, who are authorized through standardized procedures or protocols to furnish  
16 Schedule II controlled substances, and who are registered with the United States Drug  
17 Enforcement Administration, shall complete, as part of their continuing education  
18 requirements, a course including Schedule II controlled substances based on the standards  
19 developed by the board. The board shall establish the requirements for satisfactory  
20 completion of this subdivision.

21 (h) Use of the term "furnishing" in this section, in health facilities defined in  
22 Section 1250 of the Health and Safety Code, shall include (1) the ordering of a drug or  
23 device in accordance with the standardized procedure and (2) transmitting an order of a  
24 supervising physician and surgeon.

25 (i) "Drug order" or "order" for purposes of this section means an order for  
26 medication which is dispensed to or for an ultimate user, issued by a nurse practitioner as  
27 an individual practitioner, within the meaning of Section 1306.02 of Title 21 of the Code  
28 of Federal Regulations. Notwithstanding any other provision of law, (1) a drug order  
issued pursuant to this section shall be treated in the same manner as a prescription of the  
supervising physician; (2) all references to "prescription" in this code and the Health and  
Safety Code shall include drug orders issued by nurse practitioners; and (3) the signature  
of a nurse practitioner on a drug order issued in accordance with this section shall be  
deemed to be the signature of a prescriber for purposes of this code and the Health and  
Safety Code.

11. California Code of Regulations, title 16, section ("Regulation") 1442 states:

As used in Section 2761 of the code, 'gross negligence' includes an extreme  
departure from the standard of care which, under similar circumstances, would have  
ordinarily been exercised by a competent registered nurse. Such an extreme departure  
means the repeated failure to provide nursing care as required or failure to provide care or  
to exercise ordinary precaution in a single situation which the nurse knew, or should have  
known, could have jeopardized the client's health or life.

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2 **COST RECOVERY**

3 12. Code section 125.3 provides, in pertinent part, that the Board may request the  
4 administrative law judge to direct a licensee found to have committed a violation or violations of  
5 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and  
6 enforcement of the case.

7 **CONTROLLED SUBSTANCES AND DANGEROUS DRUGS AT ISSUE**

8 13. "Phentermine hydrochloride" is a Schedule IV controlled substance as  
9 designated by Health and Safety Code section 11057, subdivision (f)(4).

10 14. "Ofloxacin" is a dangerous drug within the meaning of Business and  
11 Professions Code section 4022 in that it requires a prescription under federal law.

12 **FIRST CAUSE FOR DISCIPLINE**

13 (Violations of the Code)

14 15. Respondent is subject to disciplinary action pursuant to Code section 2761,  
15 subdivision (d), in that Respondent violated Code section 2836.1, as follows:

16 a. On or about May 9, 2006, while employed as a registered nurse and nurse  
17 practitioner for Dr. M. C. of VIPS, Respondent furnished or ordered Ofloxacin for co-worker  
18 C. S.'s son when, in fact, there were no standardized procedures or protocols in place at VIPS for  
19 the furnishing or ordering of drugs or devices.<sup>2</sup> Further, Respondent did not have a nurse  
20 practitioner furnishing certificate and was not registered with the DEA.

21 **SECOND CAUSE FOR DISCIPLINE**

22 (Unlawful Prescription of Controlled Substances and Dangerous Drugs)

23 16. Respondent is subject to disciplinary action pursuant to Code section 2761,  
24 subdivision (a), on the ground of unprofessional conduct, as defined by Code section 2762,  
25 subdivision (a), in that on or about May 9, 2006, and April 28, 2006, Respondent unlawfully  
26

27 <sup>2</sup> There were no standardized procedures for nurse practitioners written or in place at  
28 VIPS until approximately April 6, 2008.

1 prescribed the dangerous drug Ofloxacin and controlled substance Phentermine, as set forth in  
2 subparagraphs 15(a), above.

### 3 THIRD CAUSE FOR DISCIPLINE

#### 4 (General Unprofessional Conduct)

5 17. Respondent is subject to disciplinary action pursuant to Code section 2761,  
6 subdivision (a), on the ground of general unprofessional conduct for failure to comply with the  
7 terms of probation and unlawful prescribing as follows:

8 a. Respondent failed to obtain the Board's approval before commencing or  
9 continuing employment as a registered nurse and nurse practitioner for Dr. M. C. of Valley  
10 Institute of Plastic Surgery (hereinafter "VIPS"), Fresno, California, in violation of the conditions  
11 of his probation.<sup>3</sup> Respondent was hired by Dr. M. C. on a per-diem basis as a recovery room  
12 nurse in approximately April 2003, and was employed on a full-time basis as a registered nurse  
13 and nurse practitioner in approximately June 2006.

14 b. Respondent failed repeatedly to report his employment status to the Board and  
15 falsified his quarterly probation reports submitted to the Board, as follows: Respondent certified  
16 under penalty of perjury on his quarterly probation reports that he had "applied for a job in  
17 Fresno" (quarterly report of January 1, 2007 through March 31, 2007), had received an offer of  
18 employment (quarterly reports of April 1, 2007 through June 30, 2007, and July 1, 2007 through  
19 September 30, 2007), and had accepted a position at VIPS (quarterly report of October 1, 2007  
20 through December 31, 2007), but concealed the fact that he had been employed on a full-time  
21 basis as a registered nurse and nurse practitioner for Dr. M. C. at VIPS since June 2006. Further,  
22 Respondent falsified his quarterly probation report for the period of January 1, 2008 through  
23 March 31, 2008. Respondent stated that he was employed by VIPS, but concealed the fact that he

24  
25 <sup>3</sup> Condition 7 of Respondent's probation states, in pertinent part, that Respondent shall  
26 obtain prior approval from the Board before commencing or continuing any employment, paid, or  
27 voluntary, as a registered nurse. In addition, Respondent shall notify the Board in writing within  
28 seventy-two (72) hours after he obtains any nursing or other health care related employment.  
Respondent shall notify the Board in writing within seventy-two (72) hours after he is terminated  
or separated, regardless of the cause, from any nursing, or other health care-related employment  
with a full explanation of the circumstances surrounding the termination or separation.

1 was hired at the facility on a per-diem basis in approximately 2004, and on a full-time basis in  
2 approximately June 2006.

3 c. Respondent failed to inform Dr. M. C. of his probation status until  
4 approximately December 2007 (Respondent had been on probation for over four years as of that  
5 time).

6 d. On or about May 9, 2006, while employed as a registered nurse and nurse  
7 practitioner for Dr. M. C. of VIPS, Respondent telephoned in a prescription for Ofloxacin  
8 (antibiotic eye drops) for co-worker C. S.'s son to Walgreens Pharmacy, Store No. 06942, under  
9 the name of Dr. M. C., without Dr. M. C.'s knowledge or authorization (Dr. M. C. had never seen  
10 C. S.'s son as a patient). Further, Respondent failed to examine C. S.'s son to assess the  
11 appropriateness of the medication, and did not have a nurse practitioner furnishing certificate or  
12 DEA (Drug Enforcement Agency) number.

13 e. On or about April 28, 2006, while employed as a registered nurse at Kingsburg  
14 Medical Center, Kingsburg, California, Respondent telephoned in a prescription for 30 tablets of  
15 Phentermine 37.5 mg. for another employee to Walmart Pharmacy, Selma, California, and  
16 represented to pharmacy staff that Dr. T. was the prescribing physician. In fact, Dr. T. had not  
17 authorized the prescription and had never performed a medical evaluation on the employee.  
18 Further, Respondent was not employed as a nurse practitioner for the medical center, was not  
19 authorized to see patients independently or to furnish medications, and did not have a nurse  
20 practitioner furnishing certificate or DEA number.

21 f. Respondent failed to notify the Board in writing within seventy-two (72) hours  
22 after he was terminated from his employment at Kingsburg Medical Center on August 19, 2006  
23 (Respondent was employed at the medical center from July 25, 2004 through August 19, 2006).

#### 24 **FOURTH CAUSE FOR DISCIPLINE**

##### 25 **(Gross Negligence)**

26 18. Respondent is subject to disciplinary action pursuant to Code section 2761,  
27 subdivision (a), in that Respondent committed acts constituting gross negligence, as set forth in  
28 subparagraph 17 (a) through (f) above.



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3 MATTERS IN AGGRAVATION

4 19. In determining the degree of discipline to be issued in the present case,  
5 Complainant alleges the following matters as evidence that Respondent has a history of being  
6 unable to conform his conduct to the requirements of the law.

7 a. Between approximately 1992 and 2000, on unknown dates, Respondent  
8 submitted claims for reimbursement to insurance companies using a billing code that identified  
9 him as a surgeon, when in fact, he was not.

10 b. Between approximately 1992 and 2000, on unknown dates, Respondent  
11 accepted compensation from insurance companies on the basis of claims in which he identified  
12 himself as a surgeon, when in fact, he was not.

13 c. Respondent's practice of submitting false claims stopped only after law  
14 enforcement intervened and arrested him in about 1999.

15 d. Respondent did not fully comply with the terms of probation with the Board of  
16 Registered Nursing.

17  
18 PRAYER

19 WHEREFORE, Complainant requests that a hearing be held on the matters herein  
20 alleged, and that following the hearing, the Board of Registered Nursing issue a decision:

21 1. Revoking or suspending Registered Nurse License Number 425362, issued to  
22 John Ralph Kelly;

23 2. Revoking or suspending Public Health Nurse Certificate Number 45861, issued  
24 to John Ralph Kelly;

25 3. Revoking or suspending Nurse Practitioner Certificate Number 14633, issued to  
26 John Ralph Kelly;

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3 4. Ordering John Ralph Kelly to pay the Board of Registered Nursing the  
4 reasonable costs of the investigation and enforcement of this case, pursuant to Business and  
5 Professions Code section 125.3;

6 5. Taking such other and further action as deemed necessary and proper.

7  
8 DATED: 4-30-10

*Louise R. Bailey*  
LOUISE R. BAILEY, M.ED., RN  
Interim Executive Officer  
Board of Registered Nursing  
Department of Consumer Affairs  
State of California  
*Complainant*

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FRESNO COUNTY SUPERIOR COURT

BY \_\_\_\_\_  
NAC DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

KINGSBURG DIVISION

JOHN RALPH KELLY, \_\_\_\_\_ ) No. 03CECG02456

Petitioner, )

v. )

JUDGMENT FOR PETITIONER

BOARD OF REGISTERED NURSING OF )  
THE STATE OF CALIFORNIA, )

Respondent. )

This cause came on regularly for hearing before this court on September 8, 2003, pursuant to the verified petition of John Ralph Kelly. Petitioner appeared with counsel, Mathew E. Faremer of Baker, Manock and Jensen, and Deputy Attorney General, Isa R. Rodriguez, appeared as attorney for respondent, Board of Registered Nursing of The State of California. The cause was heard on argument and submitted on the documentary evidence filed by the parties.

IT IS ORDERED, ADJUDGED, AND DECREED:

1. That a peremptory writ of mandate issue commanding respondent to reinstate petitioner's Registered Nurse License and Public Health Nurse Certificate and grant petitioner's application

for a Nurse Practitioner's Certificate with probation under the following terms and condition:

(1) OBEY ALL LAWS - Respondent shall obey all federal, state and local laws. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence. To permit monitoring of compliance with this condition, respondent shall submit completed fingerprint forms and fingerprint fees within 45 days of the effective date of the decision, unless previously submitted as part of the licensure application process.

(2) COMPLY WITH THE BOARD'S PROBATION PROGRAM - Respondent shall fully comply with the conditions of the Probation Program established by the Board and cooperate with representatives of the Board in its monitoring and investigation of the respondent's compliance with the Board's Probation Program. Respondent shall inform the Board in writing within no more than 15 days of any address change and shall at all times maintain an active, current license status with the Board, including during any period of suspension.

Upon successful completion of probation, respondent's license shall be fully restored.

~~RATIONALE: This condition is designed to ensure that the respondent is fully aware of the consequences of non-compliance with the Board's Probation Program and to ensure that the respondent is fully aware of the consequences of non-compliance with the Board's Probation Program.~~

(3) REPORT IN PERSON - Respondent, during the period of probation, shall appear in person at interviews/ meetings as directed by the Board or its designated representatives.

~~RATIONALE: This condition is designed to ensure that the respondent is fully aware of the consequences of non-compliance with the Board's Probation Program and to ensure that the respondent is fully aware of the consequences of non-compliance with the Board's Probation Program.~~

(4) RESIDENCY, PRACTICE, OR LICENSURE OUTSIDE OF STATE - Periods of residency or practice as a registered nurse outside of California shall not apply toward a reduction of this probation time period. Respondent's probation is tolled, if and when he or she resides outside of California. The respondent must provide written notice to the Board within 15 days of any change of residency or practice outside the state, and within 30 days prior to re-establishing residency or returning to practice in this state.

Respondent shall provide a list of all states and territories where he or she has ever been licensed as a registered nurse, vocational nurse, or practical nurse. Respondent shall further provide information regarding the status of each license and any changes in such license status during the term of probation. Respondent shall inform the Board if he/she applies for or obtains a new nursing license during the term of probation.

(5) SUBMIT WRITTEN REPORTS - Respondent, during the period of probation, shall submit or cause to be submitted such written reports/declarations and verification of actions under penalty of perjury, as required by the Board. These reports/declarations shall contain statements relative to respondent's compliance with all the conditions of the Board's Probation Program. Respondent shall immediately execute all release of information forms as may be required by the Board or its representatives.

Respondent shall provide a copy of this decision to the nursing regulatory agency in every state and territory in which he or she has a registered nurse license.

(6) FUNCTION AS A REGISTERED NURSE - Respondent, during the period of probation, shall engage in the practice of registered nursing in California for a minimum of 24 hours per week for 6 consecutive months or as determined by the Board.

For purposes of compliance with the section, "engage in the practice of registered nursing" may include, when approved by the Board, volunteer work as a registered nurse, or work in any non-direct patient care position that requires licensure as a registered nurse.

The Board may require that advanced practice nurses engage in advanced practice nursing for a minimum of 24 hours per week for 6 consecutive months or as determined by the Board.

If respondent has not complied with this condition during the probationary term, and the respondent has presented sufficient documentation of his or her good faith efforts to comply with this condition, and if no other conditions have been violated, the Board, in its discretion, may grant an extension of the respondent's probation period up to one year without further hearing in order to comply with this condition. During the one year extension, all original conditions of probation shall apply.

~~RATIONALITY: This condition shall not apply to respondents who are not registered nurses. Respondents who are not registered nurses shall not be required to engage in the practice of registered nursing. Respondents who are not registered nurses shall not be required to engage in the practice of registered nursing. Respondents who are not registered nurses shall not be required to engage in the practice of registered nursing.~~

(7) EMPLOYMENT APPROVAL AND REPORTING REQUIREMENTS - Respondent shall obtain prior approval from the Board before commencing or continuing any employment, paid or voluntary, as a registered nurse. Respondent shall cause to be submitted to the Board all performance evaluations and other employment related reports as a registered nurse upon request of the Board.

Respondent shall provide a copy of this decision to his or her employer and immediate supervisors prior to commencement of any nursing or other health care related employment.

In addition to the above, respondent shall notify the Board in writing within seventy-two (72) hours after he or she obtains any nursing or other health care related employment. Respondent shall notify the Board in writing within seventy-two (72) hours after he or she is terminated or separated, regardless of cause, from any nursing, or other health care related employment with a full explanation of the circumstances surrounding the termination or separation.

~~Notwithstanding any other provision of law, the Board shall not require a respondent to provide information regarding the respondent's health status or the respondent's work environment, if the respondent is not a registered nurse, or if the respondent is a registered nurse and the respondent is not a nurse practitioner or a nurse anesthetist.~~

~~The condition of the respondent's health is a factor in determining whether the respondent is qualified to practice nursing. If the respondent's health is such that the respondent is unable to perform the duties of a registered nurse, the Board shall suspend the respondent's license. If the respondent's health is such that the respondent is unable to perform the duties of a registered nurse, the Board shall suspend the respondent's license.~~

(8) **SUPERVISION** - Respondent shall obtain prior approval from the Board regarding respondent's level of supervision and/or collaboration before commencing or continuing any employment as a registered nurse, or education and training that includes patient care.

Respondent shall practice only under the direct supervision of a registered nurse in good standing (no current discipline) with the Board of Registered Nursing, unless alternative methods of supervision and/or collaboration (e.g., with an advanced practice nurse or physician) are approved.

Respondent's level of supervision and/or collaboration may include, but is not limited to the following:

(a) **Maximum** - The individual providing supervision and/or collaboration is present in the patient care area or in any other work setting at all times.

(b) **Moderate** - The individual providing supervision and/or collaboration is in the patient care unit or in any other work setting at least half the hours respondent works.

(c) **Minimum** - The individual providing supervision and/or collaboration has person-to-person communication with respondent at least twice during each shift worked.

(d) **Home Health Care** - If respondent is approved to work in the home health care setting, the individual providing supervision and/or collaboration shall have person-to-person communication with respondent as required by the Board each work day. Respondent shall maintain telephone or other telecommunication contact with the individual providing supervision and/or collaboration as required by the Board during each work day. The individual providing supervision and/or collaboration shall conduct, as required by the Board, periodic, on-site visits to patients' homes visited by the respondent with or without respondent present.

~~RATIONALE: The Board shall not require a respondent to provide information regarding the respondent's health status or the respondent's work environment, if the respondent is not a registered nurse, or if the respondent is a registered nurse and the respondent is not a nurse practitioner or a nurse anesthetist.~~

(9) **EMPLOYMENT LIMITATIONS** - Respondent shall not work for a nurse's registry, in any private duty position as a registered nurse, a temporary nurse placement agency, a traveling nurse, or for an in-house nursing pool.

Respondent shall not work for a licensed home health agency as a visiting nurse unless the registered nursing supervision and other protections for home visits have been approved by the Board. Respondent shall not work in any other registered nursing occupation where home visits are required.



If respondent has not complied with this condition during the probationary term, and respondent has presented sufficient documentation of his or her good faith efforts to comply with this condition, and if no other conditions have been violated, the Board, in its discretion, may grant an extension of the respondent's probation period up to one year without further hearing in order to comply with this condition. During the one year extension, all original conditions of probation will apply.

- (11) ~~1111~~ **VIOLATION OF PROBATION** - If a respondent violates the conditions of his/her probation, the Board after giving the respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed discipline (revocation/suspension) of the respondent's license.

If during the period of probation, an accusation or petition to revoke probation has been filed against respondent's license or the Attorney General's Office has been requested to prepare an accusation or petition to revoke probation against the respondent's license, the probationary period shall automatically be extended and shall not expire until the accusation or petition has been acted upon by the Board.

- (12) ~~1111~~ **LICENSE SURRENDER** - During respondent's term of probation, if he or she ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the conditions of probation, respondent may surrender his or her license to the Board. The Board reserves the right to evaluate respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license and wall certificate, respondent will no longer be subject to the conditions of probation.

Surrender of respondent's license shall be considered a disciplinary action and shall become a part of respondent's license history with the Board. A registered nurse whose license has been surrendered may petition the Board for reinstatement no sooner than the following minimum periods from the effective date of the disciplinary decision:

- (1) Two years for reinstatement of a license that was surrendered for any reason other than a mental or physical illness; or
- (2) One year for a license surrendered for a mental or physical illness.

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Dated this 24 day of September, 2003.

Jon Nick Kapetan

JON NICK KAPETAN  
Judge of the Superior Court



SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

KINGSBURG DIVISION

FILED  
SEP 26 2003

JOHN RALPH KELLY,  
Petitioner,

v.

BOARD OF REGISTERED NURSING OF  
THE STATE OF CALIFORNIA,

Respondent.

No. 03CECG02456  
FRESNO COUNTY SUPERIOR COURT  
NAG DEPUTY

STATEMENT OF DECISION

Petitioner, John Ralph Kelly, filed a Petition for Writ of Mandate seeking to compel the State of California, Board of Registered Nursing to return his registered nurse license and public health certificate and grant his application for a nurse practitioner's certificate. The petition was filed on July 14, 2003, and argued on September 8, 2003.

The question presented in this case is whether or not respondent properly revoked petitioner's registered nurse license and public health certificate and further denied petitioner's application for a nurse practitioner's certificate. The court finds that respondent failed to act properly in that: (1) petitioner's criminal conviction is not substantially related to the qualifications, functions, or duties of a nurse; and (2) respondent failed to consider new and additional evidence

1 submitted with petition for reconsideration. Consequently,  
2 Petitioner's Writ of Mandate should<sup>be</sup> and hereby is granted.

### 3 Standards of review

4 Because the revocation of petitioner's licenses involve a vested right, the  
5 correct standard of review is the independent judgment test. (*Strumsky v. San*  
*Diego County Employees Retirement Association* (1974) 11 Cal.3d 28, 34.)

6 In exercising independent judgment, a trial court is required to afford a  
7 strong presumption of correctness concerning administrative findings, and the party  
8 challenging the administrative decision has the burden of convincing the court that  
9 the administrative findings were contrary to the weight of the evidence. Neither  
presuming the correctness of administrative findings, nor placing the burden on the  
party challenging the findings, is inconsistent with independent judgment review.  
(*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812, 820.)

10 However, as pointed out by respondent, the correct standard of review for  
11 denial of the application for the nurse practitioner certificate, is the substantial  
12 evidence test, i.e., that the decision is supported by substantial evidence in light of  
13 the whole record. (*Strumsky v. San Diego County Retirement Association*  
(1974) 11 Cal.3d 28; *Harrington v. Dept. of Real Estate* (1989) 214 Cal.App.3d  
394, 404.)

14 If the word "substantial" is to mean anything at all, it clearly implies that such  
15 evidence must be of ponderable legal significance. A decision supported by a mere  
16 scintilla of evidence need not be affirmed on review. The word "substantial" cannot  
17 be deemed synonymous with "any" evidence. It must be reasonable, credible, and of  
solid value. The ultimate determination is whether a reasonable trier of fact could  
have found for the respondent based on the whole record. While substantial evidence  
may consist of inferences, such inferences must be a product of logic and reason and  
must rest on the evidence; inferences that are the result of mere speculation or  
conjecture cannot support a finding. (*Kuhn v. Department of General Services*  
(1994) 22 Cal.App.4th 1627, 1633.)

18 "[T]he focus is on the quality, not the quantity of the evidence. Very little  
19 solid evidence may be 'substantial,' while a lot of extremely weak evidence might be  
20 'insubstantial.'" (*Toyota Motor Sales USA, Inc. v. Superior Court* (1990) 220  
21 Cal.App.3d 864, 871.)

22 Also correctly pointed out by respondent is that the decision as to the penalty  
23 imposed by an administrative body, the standard of review is abuse of discretion. In  
24 reviewing the penalty, "neither a trial court nor an appellate court is free to  
25 substitute its own discretion as to the matter; nor can the reviewing court interfere  
with the imposition of a penalty by an administrative tribunal because in the court's  
own evaluation of the circumstances the penalty appears to be too harsh. . . . Such  
interference. . . will only be sanctioned when there is an arbitrary, capricious or  
patently abusive exercise of discretion." (*Cadilla v. Board of Medical Examiners*  
(1972) 26 Cal.App.3d 961, 966.)

26 The administrative findings were contrary to the weight of the evidence.  
27 (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812, 820.)  
28

## Revocation of licenses

For a nexus to exist between the misconduct and the fitness or competence to practice medicine, it was not necessary for the misconduct forming the basis for discipline to have occurred in the doctor's actual practice of medicine. (*Griffiths v. Superior Court* (2003) 96 Cal.App.4th 757, 771.)

Not cited by the parties, but relevant here is Cal. Code Regs. Tit. 16, §1444, which provides the "substantial relationship" criteria formulated for the Board of Nursing [emphasis added]:

A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare. Such convictions or acts shall include but not be limited to the following:

(a) Assaultive or abusive conduct including, but not limited to, those violations listed in subdivision (d) of Penal Code Section 11160.

(b) Failure to comply with any mandatory reporting requirements.

(c) Theft, dishonesty, fraud, or deceit.

(d) Any conviction or act subject to an order of registration pursuant to Section 290 of the Penal Code.

Here, the ALJ found that the felony convictions were substantially related to petitioner's qualifications, functions or duties as a registered nurse, or a nurse practitioner because it involved dishonesty, fraud, or deceit, with the intent to substantially benefit petitioner and to substantially injure another. (Factual finding #4.)

Petitioner was convicted for violating Penal Code §487(a) [grand theft], and Penal Code §532(a) [fraudulently obtaining money, property or labor]. It would appear that these convictions would, by their very nature, involve theft, dishonesty, fraud, or deceit.

Although the ALJ's decision that the conviction involved dishonesty and theft appears to have been correct, the ALJ did not complete the analysis for substantial relationship. He must have also determined if, to a substantial degree, the conviction evidenced the present or potential unfitness of petitioner to practice nursing in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs. Tit. 16, §1444.) In fact, it appears there is no evidence in the record to show any present or potential unfitness of petitioner to practice nursing in a manner inconsistent with the public health, safety, or welfare, other than the fact of conviction.

To the contrary, the ALJ himself explicitly found that petitioner "unquestionably has the capacity to practice safe nursing." (Proposed decision, factual finding #6.) It is not enough that the ALJ found the conviction stemmed from theft or dishonesty; he must have also found it to have evidenced, to a substantial degree, the present or potential unfitness of petitioner to practice as a registered nurse in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs. Tit. 16, §1444.)

In fact, there is uncontroverted evidence in the record that there was no expectation that petitioner's criminal behavior would occur again. (Letter from senior deputy district attorney, Burton Francis, exhibit "J.")

Petitioner contends that *Pieri v. Fox* requires present evidence of unfitness on the part of the licentiate in order to revoke a license or deny an application for a license, but that appears to be incorrect. What is required is competent evidence that the present qualifications of the licentiate is in some way "rationally and substantially related to, effected [sic] by the earlier offense." <sup>1</sup>(*Pieri v. Fox* (1979) 96 Cal.App.3d 802, 807.)

Again, here, even under the more generous substantial evidence test applicable to denial of applications for a license, there was no evidence that petitioner's earlier conviction had any rational or substantial relationship to the criminal conviction. As already discussed, the only evidence on this topic showed that petitioner's the criminal behavior would not occur again.

The decision is not supported by substantial evidence in light of the whole record. (*Strumsky v. San Diego County Retirement Association* (1974) 11 Cal.3d 28; *Harrington v. Dept. of Real Estate* (1989) 214 Cal.App.3d 394, 404.)

Petitioner's Petition for Writ of Mandate is granted under the probationary terms set forth in the judgment.

Dated this 26 day of September, 2003.

Jon Nick Kapetan

JON NICK KAPETAN  
Judge of the Superior Court

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7 Attorneys for Complainant

8 **BEFORE THE**  
9 **BOARD OF REGISTERED NURSING**  
10 **DEPARTMENT OF CONSUMER AFFAIRS**  
11 **STATE OF CALIFORNIA**

12 In the Matter of the Statement of Issues Against:

Case No. 2002-95

13 JOHN RALPH KELLY  
14 3745 W. Wathen Avenue  
Fresno, California 93711-0853

**STATEMENT OF ISSUES**

15 Registered Nurse License No. 425362  
16 Public Health Certificate No. 45861  
Respondent.

17 Complainant alleges:

18 PARTIES

19 1. Ruth Ann Terry, M.P.H., R.N. ("Complainant") brings this statement of  
20 issues solely in her official capacity as the Executive Officer of the Board of Registered Nursing,  
21 Department of Consumer Affairs.

22 APPLICATION INFORMATION

23 2. On or about August 20, 2001, John Ralph Kelly ("Respondent") submitted  
24 an application for a nurse practitioner certificate to the Board of Registered Nursing ("Board").  
25 The application was signed under penalty of perjury on or about July 22, 2001. The application  
26 was denied on or about October 4, 2001.

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### LICENSE HISTORY

3. On or about April 30, 1988, the Board issued registered nurse license number 425362 to Respondent. The license will expire on May 31, 2004, unless renewed.

4. On or about February 5, 1990, the Board issued public health nurse certificate number 45861 to Respondent. The certificate will expire on May 31, 2004, unless renewed.

### STATUTORY PROVISIONS

5. Section 2736 of the Business and Professions Code ("Code") provides, in pertinent part, that the Board may deny a license when it finds that the applicant has committed any acts constituting grounds for denial of licensure under section 480 of that Code.

6. Section 2761 of the Code states:

"The board may take disciplinary action against a certified or licensed nurse or deny an application for a certificate or license for any of the following:

.....

(f) Conviction of a felony or of any offense substantially related to the qualifications, functions, and duties of a registered nurse, in which event the record of the conviction shall be conclusive evidence thereof."

7. Section 490 of the Code states:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code."

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1 procedures. Respondent subsequently submitted a Health Insurance Claim form with fraudulent  
2 written material representation and obtained compensation to which he was not entitled.

3 SECOND CAUSE FOR DENIAL OF APPLICATION

4 (Committed Acts Constituting Grounds for Discipline)

5 11. Respondent's application is subject to denial under Code sections 2736 and  
6 480(a)(3) in that while holding a registered nurse license and public health certificate,  
7 Respondent committed acts, which if done by a licentiate of the business or profession in  
8 question, would be grounds for disciplinary action in that Respondent was convicted of a crime  
9 substantially related to the qualifications, functions, or duties of a nurse practitioner, as set forth  
10 in paragraph 10 above. This conduct would constitute grounds for discipline under Code section  
11 2761(f) and 490.

12 THIRD CAUSE FOR DENIAL OF APPLICATION

13 (Acts Involving Dishonesty, Fraud, Deceit)

14 12. Respondent's application is subject to denial under Code sections 2736 and  
15 480(a)(2) in that he committed acts involving dishonesty, fraud or deceit with the intent to  
16 substantially benefit himself or substantially injure another, as set forth in paragraph 10 above.

17 PRAYER

18 WHEREFORE, Complainant requests that a hearing be held on the matters herein  
19 alleged, and that following the hearing, the Board of Registered Nursing issue a decision:

20 1. Denying the application of John Ralph Kelly for a nurse practitioner  
21 certificate;

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2. Taking such other and further action as deemed necessary and proper.

DATED: 8/5/02

Ruth Ann Terry  
RUTH ANN TERRY, M.P.H., R.N.  
Executive Officer  
Board of Registered Nursing  
Department of Consumer Affairs  
State of California  
Complainant

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6 Attorneys for Complainant  
7

8 BEFORE THE  
BOARD OF REGISTERED NURSING  
9 DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA  
10

11 In the Matter of the Accusation Against:

Case No. 2002-95

12 JOHN RALPH KELLY  
3745 W. Wathen Avenue  
13 Fresno, California 93711-0853

ACCUSATION

14 Registered Nurse License No. 425362  
Public Health Certificate No. 45861  
15 Respondent.

16  
17 Complainant alleges:

18 PARTIES

19 1. Ruth Ann Terry, M.P.H., R.N. ("Complainant") brings this Accusation  
20 solely in her official capacity as the Executive Officer of the Board of Registered Nursing;  
21 Department of Consumer Affairs.

22 2. On or about April 30, 1988, the Board of Registered Nursing ("Board")  
23 issued Registered Nurse License Number 425362 to John Ralph Kelly ("Respondent"). The  
24 license was in full force and effect at all times relevant to the charges brought herein and will  
25 expire on May 31, 2002, unless renewed.

26 3. On or about February 5, 1990, the Board issued Public Health Nurse  
27 Certificate Number 45861 to Respondent. The certificate will expire on May 31, 2002, unless  
28 renewed.

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5. Section 2761 of the Code states:

(a) Unprofessional conduct, which includes, but is not limited to, the following:

6. Section 490 of the Code states:

7. Section 125.3 of the Code provides, in pertinent part, that the Board may  
administrative law judge to direct a licensee found to have committed a violation or  
the licensing act to pay a sum not to exceed the reasonable costs of the investigation  
ent of the case.

11

1 FIRST CAUSE FOR DISCIPLINE

2 (Conviction of a Substantially Related Offense)

3 S. Respondent is subject to disciplinary action under Code sections 490 and  
4 2761(f) in that on or about October 13, 2000, in the Fresno County Superior Court, Case No.  
5 645968, entitled *People v. John Kelly*. Respondent was convicted on his plea of nolo contendere  
6 of violating PC 487(a)/532(a) (grand theft/obtaining money). The circumstances of the crime are  
7 that on and between July 30, 1993, and July 1998, Respondent unlawfully, knowingly,  
8 designedly and fraudulently obtained possession of money in excess of \$400 dollars which was  
9 the property of 47 different insurance companies. Respondent billed various insurance  
10 companies for services he provided while assisting various doctors with surgical procedures.  
11 Respondent subsequently submitted a Health Insurance Claim form with fraudulent written  
12 material representation and obtained compensation to which he was not entitled.

13 SECOND CAUSE FOR DISCIPLINE

14 9. Respondent is subject to disciplinary action under Code section 2761(a) on  
15 the grounds of unprofessional conduct as set forth in paragraph 8 above.

16 PRAYER

17 WHEREFORE, Complainant requests that a hearing be held on the matters herein  
18 alleged, and that following the hearing, the Board of Registered Nursing issue a decision:

19 1. Revoking or suspending Registered Nurse License Number 425362 and  
20 Public Health Nurse Certificate Number 45861, issued to John Ralph Kelly;

21 2. Ordering John Ralph Kelly to pay the Board of Registered Nursing the  
22 reasonable costs of the investigation and enforcement of this case, pursuant to Business and  
23 Professions Code section 125.3;

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3. Taking such other and further action as deemed necessary and proper.

DATED: 12/17/01

  
RUTH ANN TERRY, M.P.H., R.N.  
Executive Officer  
Board of Registered Nursing  
Department of Consumer Affairs  
State of California  
Complainant